UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

v. 18 CR 36 (JPO)

DAVID MIDDENDORF, THOMAS WHITTLE, DAVID BRITT, CYNTHIA HOLDER and JEFFREY WADA

Defendants
----------x

New York, N.Y.
August 1, 2018
10:35 a.m.

Before:

HON. J. PAUL OETKEN

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
AMANDA K. KRAMER
REBECCA G. MERMELSTEIN
JESSICA GREENWOOD
Assistant United States Attorneys

PETRILLO KLEIN & BOXER, LLP
Attorneys for Defendant Middendorf
NELSON A. BOXER
AMY R. LESTER

BRUCH HANNA, LLP
Attorneys for Defendant Middendorf
GREGORY S. BRUCH

CAHILL, GORDON & REINDEL
Attorneys for Defendant Whittle
BRADLEY J. BONDI
NOLA B. HELLER

APPEARANCES CONTINUED

ORRICK HERRINGTON & SUTCLIFFE, LLP
Attorneys for Defendant Britt
ROBERT M. STERN
MELINDA L. HAAG

SEWARD & KISSEL, LLP
Attorneys for Defendant Britt
BY: RITA M. GLAVIN

THOMPSON HINE, LLP
Attorneys for Defendant Holder
NORMAN A. BLOCH
EMILY J. MATHIEU

BROWN RUDNICK
Attorneys for Defendant Wada
STEPHEN COOK
SELVIE JASON

(In open court, case called)

THE COURT: Good morning.

We're here for argument on the pending motions in the case. I thought we would start with the pending motions and then address the scheduling issue raised in counsel's July 23rd letter and with a government response of July 25th about moving the trial. As you all know the trial is currently scheduled for October 15th of this year, and defendants I believe jointly have requested that it be moved to February 11th, 2019.

I think it probably makes sense to first talk about anything anybody wants to highlight on the motions, which are a combination of motions for bill of particulars and Rule 16 discovery and *Brady* disclosure primarily of various defendants, various combinations of defendants some of which are overlapping arguments. So I thought it made sense to talk first about those. I have read all the parties' submissions and I will start with Mr. Boxer. And if there is anything you all would like to emphasize or highlight for purposes of argument, you can go do that.

MR. BOXER: Thank you, your Honor.

In our motion we are left with the bill of particulars aspects of it. Our *Brady* request resulted in a letter from the government in early June disclosing various *Brady* material. So what is on open for us is our bill of particulars. And the central argument we make, and I think it still has not been

remedied, is that the substantive counts do not articulate which wire or wires our client is alleged to have used in order to perpetrate a wire fraud.

In their opposition brief, the government cites to many paragraphs of the indictment. Only one of them is a phone call that our client allegedly participates in, and they cite that with respect to Count Four. With respect to Count Three, they cite paragraphs that do not include a wire of Mr. Middendorf. With respect to Count Five, they did not cite any paragraphs in the indictment. I think that is a classic instance where it is appropriate for the Court to direct that bill of particulars issue.

I would also note their indictment does not specify what representation or admission, breach of duty that Mr. Middendorf made that supports wire fraud counts. This has been a subject of our motion to dismiss and we have written on it in that context, but a scheme to defraud requires a misrepresentation.

THE COURT: Does it require a misrepresentation? It could be an omission. It could be fraudulent conduct.

MR. BOXER: It requires a misrepresentation or an admission, breach of a duty. I guess that there could be fraudulent conduct. It is not clear to me how that would be something other than a misrepresentation. But leaving that aside, I know there is an allegation. They cite 18, U.S.C.,

Section 2 for aiding and abetting and there is no specificity as to who breached the duty that Mr. Middendorf was aware of or who made a misrepresentation that Mr. Middendorf was aware of that he then aided and abetted in that context.

My understanding of what the theory of the case is, leaving aside misrepresentation or whether conduct could be fraudulent, as it is pled is the government's theory is that people like Mr. Sweet breached a duty that they owed to the PCAOB by not keeping confidential certain PCAOB information and then share it. Under a misappropriation theory without Mr. Sweet -- let's stick with him -- disclosing that breach, that omission is a basis for the fraud charge. So how Mr. Middendorf fits within that theory is not articulated in the indictment.

THE COURT: Are you talking about conspiracy or just the substantive wire fraud?

MR. BOXER: Well, I will speak to both, but I think it applies to both but I was speaking to the substantive. Because under conspiracy, the government still needs to prove an intentional agreement with the unlawful objective of fraud by this theory of misappropriation as I understand it.

In addition to not specifying the wires, which seems to us like a basic requirement for us to be able to meet the case and be able to plead double jeopardy if we ever needed to. The charges do not with respect to Mr. Middendorf explain

whether he made a misrepresentation that led to the fraud, whether he omitted to do something in breach of the duty he had or if the theory is he aided and abetted somebody else doing that. Whose duty was he aware was being breached and that he then went on and aided and abetted. We think in order to defend the case, we're entitled to those particulars there.

There is no doubt there is a lot of discovery. I am sure it will come up in part two about the trial date. We have the emails and documents, but I think the volume of the discovery is what actually makes it particularly important that we just have the very simple understanding what is he charged with. So that is the basis for our bill of particulars.

THE COURT: Okay.

MR. BOXER: Thank you.

THE COURT: At least as to Mr. Middendorf what the complaint is relatively focused. I will have you respond to that. Essentially if the government can respond to -- Ms. Kramer you will be responding --

MS. KRAMER: Yes.

THE COURT: -- to why can't you identify the wire transmissions and the misrepresentations or other omissions or whatever that constitute the alleged fraud.

MS. KRAMER: Certainly, your Honor.

First, Mr. Boxer's argument in support of his request for specific identification of the wire transmissions in this

case rests upon an incorrect premise, which is cited I believe in a footnote of his brief that Mr. Middendorf must have caused a wire to be sent to be guilty of one of the substantive wire fraud counts. That is not true in connection with a wire fraud scheme.

In *United States v. Halloran*, the Second Circuit rearticulated this position that a defendant can be guilty of participating in a scheme to commit wire fraud if the use of the wires would be a reasonably foreseeable consequence of the scheme to the defendant. That is certainly the case here and that is more than amply pled and more than amply demonstrated by the discovery in this case.

THE COURT: What is it that Mr. Middendorf did that is sufficiently connected to wire transmissions?

MS. KRAMER: In the first instance, your Honor, in response to the argument that it is not clear how David Middendorf fits into the scheme, I would point the Court as an example to paragraphs 32 and 33 of the indictment where Middendorf asks Sweet whether a particular issue would be the target of a PCAOB inspection and more generally which KPMG engagements would be subject to inspection that year. He goes on to talk to him about where his paycheck comes from and emails are sent and received following that in furtherance of the scheme.

For example, in 2016 in connection with the stealth

rereviews of the work papers where the ALLL monitoring program was used as a pretext to cover up the fact that the defendants, including Mr. Middendorf, had inside PCAOB information that they were not supposed to have about the inspection of certain engagements and an email was sent out by Mr. Britt saying, Here is what we want to do, we want to do a rereview in connection with the ALLL monitoring program. That email contained numerous false statements.

THE COURT: But that is not an email from Mr. Middendorf?

MS. KRAMER: No, it is not, your Honor, but that is an email that was, A, foreseeable to Mr. Middendorf, but B, also caused to be sent by him because it flowed from the conspiratorial meeting the defendants had where they concocted this plan to cover up their review of the work papers with the confidential information that they were illegally using by saying to all of the engagements in the ALLL monitoring program were going to come back and look at the work papers to make sure that everything was done. That is not at all what the purpose was. In fact, they only conducted a rereview of the engagements on the list and that sending of that email was specifically discussed in a meeting with Mr. Middendorf.

So that is one example. I don't mean to suggest that that is the only one. But to say that it is totally unclear how Mr. Middendorf could be found guilty of a substantive wire

fraud or how he fits into the fraudulent scheme is belied by the charges and the discovery that has been produced.

With respect to the notion that a specific false statement for misrepresentation must be identified, your Honor is correct that fraudulent conduct more generally is sufficient; but also this was a scheme, a fraudulent scheme, in which the defendants defrauded the SEC through implicit and explicit representations and they caused those implicit and explicit representations to be made that KPMG was complying with the PCAOB inspection process and made material omissions by not disclosing that they had advance notice of the inspection or that they had reviewed the work papers in anticipation of the inspection and omitting that the work papers in some cases were affected by this rereview that they had done focusing for a moment on 2016.

THE COURT: So did Mr. Middendorf omit to disclose something where he had a duty to disclose it? Or are you relying on an omission from a PCAOB employee who had a duty to his or her employer.

MS. KRAMER: Mr. Middendorf did not have to have a duty. In going through the inspection process, the KPMG employees who participated in this scheme and caused the rest of the KPMG employees who met with PCAOB inspectors, provided all the work papers implicitly misrepresented that they were following PCAOB rules and procedures. And that is not true.

All of this was done as evidenced by the coverup, the stealth rereview, the fact that they had a circle of trust with criminal intent.

MR. BOXER: Briefly, your Honor.

THE COURT: Yes.

MR. BOXER: We take issue with much of what the government just said as far as the evidence and what inferences should be drawn from it. I don't even think we need to decide whether the wire was reasonably foreseeable and therefore it is the basis for a substantive wire fraud charge against Mr. Middendorf. The jury instructions and at trial we will have plenty of opportunity to debate that. For now identify the wire. If the theory is it only had to be reasonably foreseeable, which wire?

THE COURT: She just identified an email from Mr. Britt.

MR. BOXER: What's that?

THE COURT: She identified a email from Mr. Britt.

MR. BOXER: Right. So that I believe that is paragraph 67. They cited that in connection with Count Four. Based on what was said today, I withdraw my request for bill of particulars on Count Four. But on Count Three what was cited is far from apparent to us and in Count Five nothing was said.

THE COURT: I think she referred to paragraphs 32 and 33.

MS. KRAMER: Your Honor, the Britt email is described in paragraph 67, your Honor.

THE COURT: Britt email.

MR. BOXER: So that is the 2016 email and our client is CC'd on the email. And at a later date we can debate cause and whether that is a basis for wire fraud. I understand that is for Count Four. Count Three and Count Five they haven't cited any anything for Count Five. Under whatever theory they are operating on, simply a notice request at this point I think we're entitled to.

Thank you, your Honor.

THE COURT: So you are asking about Count Three and Five?

MR. BOXER: I am asking about Count Three and Five.

THE COURT: Do you want to add something, Ms. Kramer, on Count Three and Five?

MR. BOXER: The answer with respect to Count Four takes care of Count Two as well. So Count Three and Five.

MS. KRAMER: Your Honor, I am happy to respond to that. There are numerous emails and phone calls in connection with the 2015 and 2017 wire fraud. I think it is worth taking a step back for a moment because with respect to 2016, that email from Britt is not of course the only wire transmission the government intends to rely upon at trial and there is a good reason that there is an overarching and long held

principle that bill of particulars are disfavored and are required only in rare circumstances where even after receiving discovery and other information the defendants have insufficient notice of what they have been charged with doing.

This is not a three-page indictment with statutory allegations and two-line to wit clauses. It is robust. The scheme here is contained in a way that some others are not. The defendants, most of them, worked together at KPMG in connection with this scheme. They know each other. They sent and received most of the emails in the case, which we have produced -- we have produced all the emails we received. So it is not as though we are cherrypicking and only giving them some of the emails or some of the phone records we have gotten.

They communicated at sort of peaks of activity in connection with each of the years when they got the inspection list, when they were gearing up for the inspections. It is not a case where they don't have notice of what they have been charged with doing. Frankly, their factual recitation in all the briefing they have put in demonstrates that point. It is crystal clear exactly what the defendants have been charged with doing and more notice in the form of a bill of particulars, which constrains the government in ways that are not favored unless absolutely necessary is not warranted here.

THE COURT: So again the overcharging point that I would say as to everyone is bills of particulars are not a

discovery device as other judges have pointed out and to ask for a identification of every wire transfer in a situation where it is pretty clear what is being alleged, I think is not a proper use of a bill of particulars. You will have wire transfers for each of the counts. No one is hiding the ball.

What is alleged here is the government is saying that this confidential information about which audit inspections were going to be done was revealed improperly and then it was hidden that it was being revealed. In every email that is about that and is using that is part of the scheme. I don't know what is being hidden here.

MR. BOXER: Your Honor, I am not suggesting anything is being hidden. They certainly described the scheme in detail, but they have charged Mr. Middendorf with the crime of committing a wire fraud. An element to that -- a necessary element is he effecting a wire. So I am missing the controversy so to speak. I am not asking them to summarize their proof, but I think he is entitled to know which wire is the basis for the scheme that is in furtherance of the scheme. So there is no doubt it is a very detailed indictment. We received a lot of discovery. I am not sure of the reluctance to explicitly point it out to us. I heard what they said about Count Four. It is there. That is the basis for our request.

THE COURT: But if emails are turned over to you in the time frame discussed in Counts Three and Five, for example,

are emails that talk about -- I haven't seen the emails myself -- inspection information that was revealed by Mr. Sweet form one of the other defendants that as alleged shouldn't have been revealed because it was a heads up about where the audit inspections were going to be. That's the answer.

MR. BOXER: I know but it is not there. Let me give you an example. So for 2015 they cite one email -- I believe it is in May -- that Mr. Whittle sends to Mr. Middendorf and attaches a list that apparently came from Mr. Sweet. That's it. He says, and I am paraphrasing, Here is the list, very sensitive, implies don't say anything about it. There is no reply. There is no answer. It is just a one-way email. That cannot be the basis for a wire fraud even the way the government described it against Mr. Middendorf because he couldn't have caused that email. There is no evidence it was foreseeable to him. It drops out of the sky and lands on his server and that is all we have seen for 2015.

THE COURT: Isn't that an argument for the jury?

MR. BOXER: It will be an argument for the jury for sure, but I think for notice for the principle behind the bill of particulars what is the wire that is the basis for the wire fraud charge against Mr. Middendorf? So I feel like a little with the government and myself we're not really disagreeing about -- I am not disagreeing about the premises. It is a lot of detail. It is just which wire.

MS. KRAMER: Just to focus for a moment on the example raised by Mr. Boxer. In paragraph 37 of the indictment, Thomas Whittle, the defendant, forwarded the list to David Middendorf, the defendant, and said, "The complete list. Obviously very sensitive. We will not be broadcasting this." That follows what begins in paragraph 32 with Middendorf asking Sweet which KPMG engagements would be subject to inspection. This is a world in which people communicate by email and cell phone. It was certainly reasonably foreseeable based on that request that the provision of the list that was precipitated by David Middendorf that the email that follows is a wire transmission that was reasonably foreseeable to him in furtherance of the scheme.

The substance of the email itself from Whittle to Middendorf for what it is not said speaks volumes about whether this was expected by Middendorf. Whittle doesn't say, I have news to share. We're getting the list. He just says, "The complete list," obviously something that Middendorf was expecting at that point. It was not news or a surprise or an unsolicited email. It was a wire transmission that was at least reasonably foreseeable to him if not caused by him. So that is one example for 2015.

MR. BOXER: I disagree with basically all of that, but I don't disagree with it for purposes of the motion. My request is simple tell us which wires they are. So if that is

the government's theory and this May email is the one and it is based on what happened two weeks before, there will be a time and place to argue that; but come out in writing and say the one in paragraph 35 I think Ms. Kramer said is the wire. That's all we're asking.

THE COURT: Understood.

Who else would like to argue anything from your motions?

MS. HAAG: Your Honor, just a couple things. As your clerk requested my name is Melinda Haag. I am here on behalf of Mr. Britt.

Your Honor, despite the volume of discovery, which has been significant in this case, based on our review of the discovery, I and others had this overarching concern which is that the government wasn't looking at its discovery obligations broadly enough or thinking broadly enough about where they should be looking. Frankly, those are the biggest mistakes in discovery that I have seen not thinking about it broadly enough and not thinking about it from a defense perspective and not thinking about where you should be looking.

So one of the things we did in response to that feeling was we asked the government some questions. For example, is there anybody who reviewed work papers and participated in a rereview of work papers in 2016 and didn't think the changes were significant or didn't think the changes

were inconsistent with the accounting rules.

THE COURT: And they gave you names?

MS. HAAG: Yes, they gave us names. So my concern is that indicated to me they weren't thinking about that as being exculpatory for the defense until we raised it.

Another question was is there anybody who had the same information that our clients had or some of the same information that our clients had and they didn't think there was anything wrong with this. They didn't think there was anything criminal or anything wrong with this. We got names in response to that as well.

Again, it causes me concern that the government isn't thinking about this from the defense perspective, which is what they have to do when thinking about what is exculpatory, what is helpful to the defense, what counters the government's case, and what bolsters the defense case. So I find it hard to believe that we have asked all the right questions and those are the questions we asked and we got answers to those, but I fear that there are other questions out there that we haven't thought to ask or haven't asked the government. So that is where we're coming from.

With respect to those particular issues, the government did tell us, yes, there are people who participated in the rereview of work papers in 2016 and didn't think changes were substantive and didn't think changes were inconsistent

with the accounting rules. That to me reads on the allegation that our clients engaged in a scheme to impede the function of the PCAOB. So that is why it bolsters the defense, counters the government's case and it is exculpatory. So the government did provide us with the names, but, your Honor, we submit that the names are not enough.

The standards are articulated in a few cases, one of which the government cited and a couple that we cited. The standard for what is enough when you are providing that exculpatory information *Stewart* puts it in terms of a essential facts. You have to provide the essential facts. The *Rodriguez* case that we cited talks about the fact that disclosures must be sufficiently specific and complete to be useful.

THE COURT: Well, in your reply brief you talk about they have to disclose facts even though you acknowledge that witness statements are not yet required to be disclosed and you seem to suggest that they need to go through and pull facts out of the witness statements and the disclose those parts of the documents that are facts.

MS. HAAG: I think that is what is required to comport with the standard here. We have the names. We have no other detail. Providing us names is an acknowledgment that it is exculpatory.

THE COURT: But that is enough for you to investigate what could be exculpatory I would think.

MS. HAAG: Well, your Honor, we can try to talk to those witnesses. Witnesses of course don't have any obligation to speak with us. The government is sitting on this information. I am guessing, I don't know, the government has interview memos for 13 different people that in our view and the government's view provide exculpatory information for our client.

They have given us the names, but what is also exculpatory are the details. If the names are exculpatory, I submit the details are exculpatory. If someone is saying, Yeah, I didn't think there was anything wrong with this, then what is it that they knew? Did they have any conversations with our clients about that? Did they have conversations with anybody else about it? What are the details behind somebody saying, I didn't think there was anything wrong with that?

Your Honor, there is some discovery that reads on this and this sort of folds into another issue here and it actually folds into the motion for bill of particulars so maybe will put that off to the side. We believe that the information is exculpatory, the names and the details. The government seems to agree. They provided us with the names, but they are holding back information that is in their possession about the details, 13 different people who provided exculpatory information with respect to the defendants. I didn't think there was anything wrong with this. I had the same information

or at least some of the same information as the defendants and we didn't think that we made any nonsubstantive changes to the work papers that affected the accounting rules or were inconsistent with the accounting rules. That is incredibly important exculpatory information. The government has it and they don't want to give it to us.

In terms of it being a witness statement, your Honor, the government seems to be withholding it as *Giglio*. I am guessing these are not actually *Jencks* statements, statements made by the defendants, approved, signed by or transcripts or grand jury transcripts. I don't know that but I am guessing that is not the form that it is in. The government is holding it as *Giglio*. We're not seeking it as *Giglio*. We wouldn't seek to impeach these people based on this information obviously. This is information that is exculpatory for the defendants. I don't think it is right to hold it back as *Giglio*. If it exists in a memo of interview, the government can provide that or I suppose they can provide a factual summary if there was some reason not to provide the memo itself, but it seems to me this is exculpatory information about 13 people that comes from 13 different people. That is huge and government is sitting on it and not providing it. That is one thing I did want to highlight.

Three more things. One is that the government indicated in court in connection with the motion to dismiss

that the PCAOB -- that PCAOB costs of creating these lists and recreating lists was significant and they spoke in terms of hundreds of thousands of dollars if not more. We have zero evidence on that. That is something the government I believe intends to prove at trial, the fact of the costs of creating list and recreating the list. We have, I believe, zero evidence to support that.

THE COURT: If, for example, the basis for that were conversations with people and they planned to get the documents to support it or work on witness testimony in the couple weeks before trial whenever that is, what would they have to turn over now?

MS. HAAG: Well, the government can and often does turn over summaries of things like that. So, for example, if an AUSA is talking to a witness, and I assume that is what this is, an AUSA is talking to a PCAOB witness and that witness says, Hey, here is the cost and here is how we calculated it --

THE COURT: Well, then you get it in the 3500; right?

MS. HAAG: If there is a *Jencks* statements, but in that scenario I don't think it is that common to create or generate a *Jencks* statement. I don't know that it would come in that form. At the moment the government interviews this witness and learns here is what the cost was, here is how we did it, in my view and I submit to the Court that is the information the government intends to introduce at trial and

the government is able to provide that to the defense in some form. It is very common for the government to put that kind of thing in a letter.

For example, the government identified those 13 people to us in a letter. They didn't provide the interview memos, which has its only issues, but they can do that and often do it and it's a common practice. It's critical information. They are going to seek to introduce it at trial. They are sitting on it today and we're asking the Court to provide it to us.

If the PCAOB calculated the costs, I also am guessing -- again, I don't know -- there are documents that underlie that calculation. That is not just a conversation, but that somebody at the PCAOB sat down with pencil and paper in some form and calculated those costs and there are documents that support whatever this person said to the government. So we're asking for that evidence.

Third, the government also made comments during the motion to dismiss hearing that the SEC has certain views on audit quality. Again, we have no evidence on that at all. That is evidence that we think the government will seek to introduce at trial and we think it is appropriate for the government provide that information to us and the information from the SEC and any documents underlying that.

Finally, our request that the government conduct a broader search of the SEC and PCAOB files. So at this point

what we're asking for from the SEC files are five things: Policies, etc., that describe the relationship with the PCAOB which is an element and the government we assume intends to prove that; the PCAOB inspection reports of KPMG that are maintained in the SEC, which is also relevant to the issue of SEC's relationship to PCAOB; third, communications among SEC personnel or between the SEC and KPMG related to a February 16th, 2016 meeting that was held at the SEC and that folks from the KPMG attended; fourth, SEC emails that essentially contain *Brady* or Rule 16; and fifth, interview notes with SEC personnel assuming that there are people at the SEC that interviewed fellow SEC personnel in connection with this case.

There are indications in this case to us that this was a joint investigation between DOJ and SEC. There are six things I think that indicate that. First, that the DOJ and SEC filed their charges on the same day; second, that they filed those cases against the very same people, and I know the Court hasn't had the opportunity or I am sure the desire to go through the discovery but there are a lot of other people that are sort of in this story if you will and the SEC and DOJ chose to focus on exactly the same people; third, Mr. Sweet is cooperating with both the SEC and the DOJ as far as we know; fourth, the factual narrative in the SEC's filing and the indictment very closely mirror each other; fifth, the SEC was

present during witness interviews; and sixth, there is apparently an agreement between DOJ and the SEC for the SEC not to take notes because it has been represented to us that they didn't and I cannot imagine that the SEC would sit in an interview and not take notes unless there was agreement between the SEC and the DOJ that that is how it would be handled.

So there are certainly indications to us that it was a joint investigation and that it is appropriate for the government go to the SEC and ask for certain materials and in particular the materials that we described. We're not asking DOJ to go into SEC databases that hold evidence and information from all around the country. As the government indicated, it is very specific, very narrow, very related to this case and we think it is appropriate given the relationship to the SEC and the DOJ in this case for the government to be expected to do that.

The *Martoma* case is one we cited to you and the Court there found that there was a joint investigation for these purposes because four things existed in that case: The agencies conferred about their investigations, which I am guessing that happened here; they jointly conducted interviews, which appears happened here; the SEC provided the government with documents it obtained as part of its investigation, which I am guessing happened here; and they coordinated efforts in conducting depositions, which if you substitute deposition for

interview happened here.

So it seems to us that it is appropriate there is close enough relationship between DOJ and SEC that the Department of Justice should go to its partner and ask for these specific materials that are relevant to the defense, that bolster the defense, very narrowly tailored. We're not asking that they go and root through all of SEC's databases and files. Frankly, the government can ask the SEC to assist and so I think it is appropriate to go to the SEC and say, Hey, can you find these things and work with them. It is not like they need to go into the SEC headquarters and root around. They can certainly work with their partners at the SEC. Courts order that all the time. I know the Court ordered it in the *Gupta* case for them to simply work together.

With respect to the PCAOB it is a little less clear, the relationship. We're asking for four things in that regard. First, policies and memos and things describing the relationship with the SEC, which is of course a critical element here; policies and memos that relate to the confidentiality of the inspection lists; third, any memos summarizing interviews of PCAOB employees. So it seems to me quite possible that PCAOB personnel interviewed PCAOB employees and that it could be relevant to this case, could be exculpatory, could bolster the defense, and seems to be appropriate for the government to obtain; finally, emails for

Mr. Sweet, Ms. Holder, and Mr. Wada. That would be a very short period of time for each of them. I think just a couple two, three months for each of them. The relevant time frame while they were at the PCAOB for each of them is very short so it would be a very narrowly tailored review of their emails. It is not clear to us that any anyone has gone in and looked at all of their emails. We have gotten a few. We have not gotten very many and it is not clear to us that is being done.

So I think it fair to say it is less clear what the relationship was between the Department of Justice and PCAOB, but there is some indication and we would ask the Court to inquire in some form of the government or ask the government to provide information about the relationship, but what we do see is that the PCAOB clearly produced evidence to the government and there is certainly evidence of discussions between them because as the government has related they have been in discussions about what the costs were to the PCAOB of creating and recreating lists.

So we have some indication. With all candor we don't have as much indication, but we certainly have some. So I wanted to highlight that was as well. Those are the things I think are important to highlight from the discovery motions -- the motion that we filed. I am obviously happy to answer the Court's questions. There are two things from our motion for bill of particulars that I would like to highlight.

THE COURT: Go ahead and do the bill of particulars and then I will have Ms. Kramer respond.

MS. HAAG: We asked for five. I know the Court has read the papers so I won't belabor all of them, but I wanted to focus on two. The first is our number one request and that relates to paragraph 72 of the indictment, which alleges that the rereviews conducted in 2016 uncovered significant problems with audits and then the indictment proceeds to give "examples" of that. It is important to us to know you have given us a couple of examples of things the government thinks exceeded the accounting rules, were inconsistent with the accounting rules, but the indictment speaks in terms of examples. So we need to know is there anything else.

We have been given some work papers. We have not been given complete set of the work papers. We're playing a guessing game. Is there something else? We have a number of witnesses who have said, We didn't think we violated the accounting rules in anything we did in this rereview. We have that and then we have the government giving us a couple of examples. It is important for us to know if there is anything else. We have to be able to counter that and so we're asking that the government specifically identify what happened in the rereview that you think violated the accounting rules. We need more than the "examples."

The other one I would like to focus on is our number

five. In paragraph 91 of the indictment, the indictment speaks in terms of the defendant's misappropriating confidential information from the PCAOB. We assume that the confidential information that is at issue in this case are the three so-called lists from 2015 and 2016 and 2017. Again, I know Court hasn't had the benefit of reviewing the discovery.

I think it is fair to say that Mr. Sweet provided all kinds of information from the PCAOB throughout his time at KPMG. I will call it inside baseball. All kinds of information. He makes a presentation to KPMG personnel. There is a long, long email addressed to a whole long list of people at KPMG with all sorts of what I call inside baseball from Mr. Sweet. There are conversations and information that he provides to other KPMG employees that I will call inside baseball. We don't know what the government views as the confidential information at issue in this case. We are operating on the assumption that it is the three lists. That is what we put in our motion. The government did not respond to that so we haven't gotten in insight, but we need to know so we can counter what the government's view is of what information that Mr. Sweet provided during his time at KPMG was the confidential information at issue.

With that I will rest.

THE COURT: Thank you.

Ms. Kramer, would you like to respond?

MS. KRAMER: Yes, your Honor. Is it okay if I start the order in which Ms. Haag went?

THE COURT: Sure.

MS. KRAMER: The request for the interview memos of the individuals the government identified in its letter in response to the defendant's request is one that is without basis in law, but first I think there are some factual perhaps misunderstandings that need to be corrected. The government has not acknowledged that the items that were requested by the defendants and that the government provided that that constitutes exculpatory material. That is I think something Ms. Haag might have said three or four times.

That is not an acknowledgment. They requested that we make the disclosures. We made them. I think to turn that into an acknowledgment on our part counters the requests that are often made by defense counsel that even if you don't agree something is exculpatory. We think it is, please give it to us. It is not an acknowledgment on our part that that is exculpatory. The notion that we have to produce interview memos is not supported by the case law.

I think some of what is happening here perhaps is the result of different practices in different districts leading to a misconception of how we might make disclosures in this case. So our office takes a generally expansive view of what constitutes 3500 or Jencks Act material. We are not going to

be producing, as many counsel know sitting here, only those statements that were signed by a witness or a verbatim transcript. We generally produce the interview memos that agents made or notes that AUSAs take when a witness who is going to testify is meeting with us and we take notes in those meetings. So to say that something needs to be produced now because it doesn't fit into the narrow definition that defense counsel is giving to 3500 is inconsistent with our practice and I think we would be here for a different motion if we took that position when it came time to produce 3500 in this case because it would amount to a very thin binder as opposed to the robust production that we'll be giving.

The witness statements will be produced when we produce 3500 material and we're just not required to do it sooner even to satisfy a *Brady* requirement. We have given the essential facts that allow the defendants to use this information. The Second Circuit has specifically held in *Stewart* that the government is not required to make a witness's statement known to a defendant who is on notice of the essential facts, which would enable him to call the witness and take advantage of any exculpatory testimony he might furnish.

I think one thing was said that is not correct, which is that the witnesses who said that they didn't think something was a crime knew the same thing, had the same information as the defendants is not true. That is not what the evidence

reflects and I think there is just no basis to order the production of witness statements at this time. The government gave the disclosure and the defendants can use that disclosure.

The questions about evidence that has not been produced under Rule 16, as your Honor pointed out to the extent that we intend to prove certain aspects of the case through witness testimony without underlying documents, we will produce those witness statements when we produce 3500 material in this case as we always do. We are not sitting on documents that are required to be produced under Rule 16 nor would we.

In turning to the question of whether the government should be required to go to the SEC and search its files to satisfy both the government's Rule 16 obligations and obligations under *Brady*, the defendant's motion should be denied on that point. First, there was no joint investigation between the government and the SEC in this case. We did not make joint charging decisions. We did not make joint strategic decisions. We did not coordinate prosecutorial strategy.

THE COURT: I have never dealt with this particular situation, and I know Judge Kaplan has and Judge Rakoff has. I wonder if you know how they have dealt with. All I have is representations from the government, and maybe that is what they rely on and the kind of circumstantial data points that are emphasized by Ms. Haag.

Do you know how this is done by other judges, how they

look into and make the determination of joint versus parallel investigations?

MS. KRAMER: I know that in a case that I personally tried before Judge Preska that she relied on the representations of the parties. I know that has happened in some of the other cases your Honor is talking about. There are several other cases like that where judges have made this decision based on representations by the government, including Judge Carter in *United States v. Durante*. I don't know if that is what Judge Rakoff and Judge Kaplan relied upon, the cases that your Honor is talking about.

Judge Kaplan's decision in *Blaczak* is useful. I don't believe there was a hearing on this so I don't know if he merely relied on representations or something more, but there is a question and some divergence among judges about what is a proper inquiry when attempting to understand whether there was a joint investigation. Judge Kaplan's reasoning in *Blaczak* is really on point in what your Honor uses in this case. He looked at whether the parties shared the joint strategic decision-making. That was in March of 2017. He denied a similar motion there. He was persuaded by the fact that the SEC wasn't involved in the government's grand jury presentation, wasn't present at some prosecution interviews, didn't review documents that were gathered only by the prosecution, and did not develop prosecutorial strategy.

THE COURT: Well, do you know the answers to those questions in this case?

MS. KRAMER: Yes. In this cases, your Honor?

THE COURT: If you can go through those.

MS. KRAMER: Certainly, your Honor.

The SEC most certainly was not involved in the government's grand jury presentation and was not privy to any grand jury material. The SEC did not review documents that were gathered only by the government and did not develop any prosecutorial strategy. Whether the SEC was not present at some interviews is an open question. We were trying to recall this and weren't certain. If not present, it was at a very small number. But that fact alone shouldn't be dispositive as it wasn't in other cases where the Court actually looked at joint fact-gathering efforts.

Even in the case relied upon by the defense, *Martoma*, what Judge Gardephe ordered in that case in granting the motion was extraordinarily limited. He ordered that the government was obligated to produce communications from the SEC to cooperating witnesses that threatened criminal prosecution for not implicating *Martoma*, the defendant in that case, or that promised nonprosecution agreements for implicating him.

Even in *Gupta* Judge Rakoff required the government to review -- first of all, neither *Martoma* or *Gupta* required the government to review SEC material for Rule 16 purposes as the

defense suggested. But even if *Gupta*, Judge Rakoff required the government to review for *Brady* only documents that arose from joint efforts to investigate the facts of the case together. Central to the Court's decision was that the government could easily access the requested materials.

I am not sure where the representation is coming from that this is a narrow request and that it would be simple for the government to comply. On the subject of a *Brady* review, we could not delegate our review for *Brady* to anyone and certainly not to the SEC, who I want to unequivocally say is not our partner in this case. The U.S. Attorney's Office has investigated this case with its law enforcement partner, the United States Postal Inspection Service. The SEC is a separate agency. We have made separate decisions.

None of us know sitting here today what their database looks like, what they have collected. We have not been a party to their thought process about what documents are relevant to their own determinations. So if we don't know it, I don't know how defense counsel could know that this is a limited body of material to be reviewed. We certainly could not satisfy our obligations or stand up here as officers of the court and say we have complied with an order to review something if we did not actually lay eyes on it ourselves.

Under either inquiry whether there was joint strategic decision-making, which is what Judge Kaplan looked at after a

well long reasoned opinion or whether there was joint fact-gathering, the defendant's motion should fail in this case. The fact that witnesses did not have to sit to have the same or similar interview twice because the SEC was permitted to be present when he conducted an interview does not make this a joint investigation and certainly does not make the SEC an arm of the government in this case. The argument that the PCAOB is is even less compelling. There was no coordination with the PCAOB. The fact that we asked the PCAOB for documents and we interviewed witnesses from the PCAOB makes them no more our partner than when we get documents and call witnesses from AT&T and Verizon. We were not engaged in joint fact-gathering or joint strategic decision-making.

Unless your Honor has other questions on this point, I will turn to the bill of particulars request.

THE COURT: Sure.

MS. KRAMER: With respect to Defendant Britt's bill of particular requests, I think that the two points that were principally discussed today were first wanting more than just examples of specific problems with audits. Defense counsel is correct that specific examples were given; but to be clear, all of the work papers in the government's possession have been produced to defense counsel. Again, there is no hiding the ball here. They have from our understanding been engaged in an in depth and thorough review of those work papers -- looking at

them, analyzing them -- and there is nothing more than we need to add to apprise them of what they are being charged with.

The fact that I think the statement was made that the defendants didn't intend to violate a PCAOB rule or accounting procedure that is evidence that they didn't intend to commit the crime in this case, that is not the case at all, your Honor. That is evidence that they didn't intend to commit a separate act of wrongdoing. It is not something that they need to be specifically apprised of more than they already have of the examples and they have gotten all the work papers that the government has.

With respect to what is the confidential information that was misappropriated from the PCAOB, defense counsel is correct there are other examples. There are other examples in the indictment. Beginning on page 17 with paragraph 42, there is an entire section titled "Sweet shares other confidential PCAOB information with KPMG personnel in 2015." So, yes, there is other confidential PCAOB information that was part of the crimes that are charged. That has been apparent since the indictment was unsealed and that has been apparent from the discovery as Ms. Haag points out, and nothing more is needed on that point. There is ample notice.

THE COURT: It is not just the inspection of lists for the three years?

MS. KRAMER: Correct, your Honor.

The Second Circuit has made crystal clear that a defendant does not get the whens, wheres and by whoms of a crime, the evidentiary detail to which he is not entitled through a bill of particulars motion. Well, of course, more detail will be helpful to defendants. That is not what a bill of particulars is for. To the extent they want to know what other confidential information was shared from the PCAOB, they have it in all of the discovery. So this bill of particulars motion should also be rejected, your Honor.

THE COURT: Thank you.

Did you want to reply to anything?

MS. HAAG: Just a couple of things, your Honor.

With respect to the SEC, the request that the government looked at the SEC or worked with the SEC to gather some evidence and discovery, again in feeds into my concern that the government isn't looking at its obligations broadly enough. A critical element for the government to prove, and of course that we take great issue with, is what role did the SEC play here. The defendants are charged with a conspiracy to defraud the SEC, which depends entirely on a relationship between the SEC and the PCAOB. We have asked: Are there any policies? Are there my memos? Is there anything at the SEC or PCAOB that talks about the relationship between the two of them and what oversight is performed by the SEC? Does the SEC look at these reports when they come from the PCAOB and analyze them

every year? Does the SEC sit down and meet with the PCAOB? What level of oversight is there?

My concern is if this is a critical element for the government to prove, why hasn't the government gone to the SEC and said, Hey, we need to essentially prove the relationship between these two agencies. So talk to us about that, give us your policies, give us memos, give us documents that read on that issue. We don't have anything and my concern is the government again is not looking or thinking broadly enough about what evidence it should be gathering. If there is an absence of it, then it would be good to know that as well from the defense perspective; but if there are policies, procedures, memos, and things like that that describe the relationship, it is information the government is going to try to prove up at trial and it is information we have to address.

Also with respect to the PCAOB inspection reports maintained by the SEC, again do these reports come into the SEC and go into revolving file and that is it? I think that reads on the issue of whether the defendants intended to or committing a conspiracy vis-á-vis the SEC.

There was a February 2016 meeting with SEC people and KPMG people. We received one document that relates to that. It is a summary memo that was prepared for the chair the commission in connection with that meeting. What we have asked for is there anything else. Again, I would be surprised if the

government didn't say, Hey, this meeting is important and it is referred to in the indictment. What communications were there about this meeting at the SEC? We should gather that. If the government didn't gather it, fair enough. But what we believe is appropriate is that the government now go to the SEC in connection with its joint relationship with the SEC and obtain these documents.

Obviously I have no reason to doubt Ms. Kramer with respect to her representations to the Court, but I do think it is appropriate to have an evidentiary hearing on this issue. If there wasn't a joint investigation, if there wasn't coordination between the SEC and DOJ, how is it that their filings are so similar? How is it that they chose the exact same people to bring their cases against? How is it that they agreed that the SEC would not take notes?

The reason that the SEC doesn't take notes I submit is obvious, that the government wouldn't want two different government agencies to create notes or memos of witness interviews so they don't create inconsistent statement. There is a reason for that and it demonstrates some coordination between those two agencies. I don't think it is fair to say that the DOJ is not to the SEC in this case just as an AT&T custodian of records is to the Department of Justice. The relationship between the SEC and DOJ is very different.

It appears to us there were objective signs that they

were working together, that it is a joint investigation. There is nothing wrong with that. It happens every single day in a case that is in the jurisdiction of the SEC and DOJ. The only thing that matters is, okay, if you are going to work together to the extent there are materials that are discoverable to criminal defendants, the department should go to its partner and try to obtain those materials for the criminal defendants.

With respect to the bill of particulars, again the government has said here is a couple of examples of problems with the changes to the work papers. Apparently what I am hearing and assuming, and I have to assume in connection with defending Mr. Britt, is that there are other things the government thinks violated the accounting rules. I have no idea what they are. The work papers are very hard to read, changes to the work papers are very hard to discern. If the government is going to walk into this courtroom in front of a jury and say, We gave you examples in the indictment, but here are five other things that happened to those work papers that we think violated the accounting rules and we hadn't figured that out from the work papers, we'll be caught completely flatfooted and unable to respond to those representations by the government and that is what we're trying to avoid. I think is fair and appropriate for the government to point out to us any changes in the work papers they intend to walk into this courtroom and tell the jury violated the accounting rules and

were substantive changes to the work papers.

With respect to the confidential information at issue here, fair enough, the three lists and then the government again gives a couple of examples of information that Mr. Sweet provided included in the indictment. As I said, if you read the discovery, Mr. Sweet is providing all kinds of information inside baseball. If we can take all that off the table and we don't have to worry about trying to counter it, that's great. If the government will tell us that, that is great and we will not worry about everything else that Mr. Sweet said.

In the same way what we don't want is walk into this courtroom and have the government come in and say, Oh, yeah this thing Mr. Sweet said in this email on this date, that is part of this case as well. This thing he said in this email is part of this case as well. This thing he said in that meeting at KPMG is part of this cases as well. We don't want to be caught flatfooted and unprepared to respond to those claims of that these pieces of confidential information are part of this case.

That is all we're asking. Tell us what this case is about. Tell us what you are going to come in tell the jury is a problem and we'll be ready to respond to it. Those are two examples of places we will just not be able to respond to it if the government won't give us the details.

MS. KRAMER: Your Honor, may I respond?

THE COURT: Yes.

MS. KRAMER: So I think it is plain that the defendant is not asking here for exculpatory information from the SEC or the PCAOB because they think that actually exists. What they are asking for is 3500 material and to direct our investigation. The fact that a certain fact is significant or critical does not mean that the government is required to go out to a third-party and collect documents to produce them to defense counsel. If there are documents that they think exist that are admissible and evidentiary and are not the subject of a fishing expedition, they can certainly subpoena those documents.

On the work paper issue, it is a closed universe. There are the work papers we have received and produced and that is it. It is our understanding that the defendants are going to get a presentation from KPMG sort of showing the changes in the work papers as KPMG learned they existed. So to the extent there is lingering confusion about whatever is in the work papers, it certainly seems like they are going to get additional information from KPMG about what changes were made.

On the notion of what is the purpose of a bill of particulars, the question is whether there has been sufficient notice. The fact that it would be great for defense counsel if they could take something off the table in knowing what will be proved at trial is exactly the kind of thing that the bill of

particulars is not meant to do. We're not required to itemize our proof or to walk the defendants through and preview what the case will be and it sounds like more than sufficient notice has been given.

THE COURT: Are there any other counsel that would like to address any other matters in the papers?

MR. BLOCH: Yes, your Honor. May I speak from here rather than climb over co-counsel?

THE COURT: Yes. As long as the court reporter and everybody else can hear you.

Do you want a microphone?

MR. BLOCH: I don't think it is necessary.

Your Honor, we made two points in our papers and I don't want to belabor the arguments there with respect to bill of particulars. The first had to do with asking the government to identify the unindicted coconspirators. Their response basically was, We don't want to. We tried to make a reasoned argument addressed to your discretion, your Honor, about why we need it. I want to point out a few specific reasons why as a practical matter this is material for the defense.

First, we talked about the rereviews that were conducted in 2016. Is it the government's position that all of the rereviews involved were coconspirators with the indicted defendants? It affects how we look at the large volume of communications that we received. We received tens of thousands

of emails and texts. And if can focus in on the ones that are significant and certainly coconspirator communications as identified by the government are important for us to figure out. It is hard to do without having them identify it.

Second, your Honor, Ms. Kramer was very careful in stating that the names of the people that were disclosed to the defense in the June 1 letter were not -- they contained information that we might view as exculpatory but which the government doesn't necessarily agree. But it doesn't answer the other part of the equation, which is is it the government's view that those people despite their comments or statements that we view as exculpatory that the government also views them as coconspirators with the indicted defendants.

Lastly, there are people who are anonymized in the indictment whose names we have obtained in discovery. Is it the government's position that those are coconspirators of the defendants? It is important, your Honor, in preparing and in thinking about how the case is going to get tried. If the government is going to introduce out-of-court statements by coconspirators, then the defense has the right to impeach those out-of-court declarants if they are coconspirators.

So it is important to know. The government hasn't provided the Court with any specific reason why it shouldn't do this and as we have put in our papers it is not uncommon to provide this information especially in a white-collared case

like this where there is no danger to any witnesses or identified coconspirators.

Second, your Honor, we ask that the government identify the "other duties" the defendants are alleged to have breached either as principal or as aiders and abettors. Again, we have all been talking both in motion to dismiss the indictment and even today about the duty of confidentiality that has been breached allegedly by PCAOB personnel; but when we talk about other duties, what are we talking about? We're not asking for the evidence. We're not asking for a theory. What is the duty? If I can figure it out, your Honor, I wouldn't be standing here asking the Court to order the government to tell us. If they are not going to identify another duty that we are focused on the duty of confidentiality, then let's say that and be done with it and move on. Thank you.

THE COURT: Thank you, Mr. Bloch.

Would you like to respond, Ms. Kramer?

MS. KRAMER: Yes, your Honor. Thank you.

So with respect to the concern that defense counsel needs to know sort of for hearsay purposes and evaluating admissibility of statements whether the government intends to offer statements of unindicted coconspirators, the government will give such notice at the time motions in limine are due so it is sufficiently in advance of trial for the parties to work

out and for the Court to decide any hearsay issues that flow from that.

Aside from the hearsay issues there is nothing about the defendants' requests that calls for a bill of particulars on this point. The fact that it would be useful for the defense in preparing their case does not mean that they have insufficient notice right now. This was a little more expansive than *Block*, which your Honor presided over; but for same reasons your Honor denied the motion for a bill of particulars in *Block* on this point, you should deny one here.

Cases that involve such requests where they are granted generally involve conspiracies with a large number of coconspirators over a very long period of time. Here, this is as I have said a closed universe where all but one defendant worked at the same company and in many respects in the same part of the same company. They worked together. The time period that is alleged is not as short as in *Block*, but the instances of activity around the receipt of the misappropriated information and the use of it are very clear. These defendants were the ones emailing other individuals in the case, having phone calls with them, having meetings.

The email that we have talked about already from Britt about the stealth rereview, the pretextual email, there is a list of individuals in the to box in that email. This is not international money laundering narcotics conspiracy where the

defendants simply have no idea who may be an unindicted conspirator, can't identify witnesses. We will produce witness statements for any unindicted coconspirators at the time we produce 3500 material per Rule 806. Defendants will have the opportunity to review that material and nothing more is required.

With respect to the other duties questions, I think the government will confer and will give notice to defendants if there are any other duties that were violated other than the duty of confidentiality by the PCAOB employees that we intend to proceed on trial.

THE COURT: You are not saying there are not other duties, but you are saying --

MS. KRAMER: I am saying we would like a week to discuss it and we'll give notice to defense counsel.

THE COURT: Fair enough.

Does anybody else want to add anything?

MR. BLOCH: Practically, you can have an email with 15 people on the specifics. That doesn't tell us who the government says is a conspirator. I can have my own views, but there are elements to it. Without the government telling us, we don't know. Is it all of them? Is it three of them? Is it others at the PCAOB? We don't know.

As I said, your Honor, we're not finished going through the voluminous discovery we already received, but all

of the thousands of messages we would like a little help in focusing on what we're supposed to be doing to prepare for trial.

THE COURT: Thank you.

Any other counsel want to add anything?

I think my questions have been answered by everything we covered. I am going to reserve decision on the motions for now. I would like to turn to the scheduling issue.

Five-minute break.

(Recess)

THE COURT: I have read the parties' letters about the trial date and with the following introduction I would like to again confirm what each defendant's position is and what the government's position is. The introduction is this: If I move it, it would have to be I believe to February 11th not to an interim period. I don't think I can move it to November, December because I am on Part I duty the last week of November, and first week of December, which means I am the emergency on-call judge and cannot schedule trials during those two weeks. If I moved it, it probably would be to February 11th.

That having been said, I am not inclined to move it unless it is really absolutely necessary. The other thing I would say is it is August 1st and there are two months between now and October 15th. I am not sure why two and a half months wouldn't be enough for everyone to prepare for trial

particularly given that y'all are not lacking in resources in terms of lawyers and legal assistants and things like that I believe as far as I know.

Let me hear the position of each of you very briefly. Just anything you would like to highlight.

I will start with you, Mr. Boxer, because last time your client was the one who took the position that you would like to have a trial.

MR. BOXER: We did. In the division of our labor, I was not assigned leave for this topic but I do have some views and let the others speak. Essentially for us there has been more discovery than predicted in March. I don't ascribe any fault to the government. It is not uncommon and nothing purposeful or nothing misleading, but for us there was more discovery than we expected. I believe it will be helpful to have more time to review it. I think it will actually lead to a more efficient and concise presentation. I don't see any prejudice to the government and I don't see anything in their correspondence. It is the first request.

For those reasons we join in the application.

THE COURT: Anyone else?

MR. STERN: Good morning, your Honor. Rob Stern on behalf of David Britt.

I will echo what Mr. Boxer said. I will not repeat the arguments made in the letter. We do believe that there has

been significantly more discovery. There have been problems with the discovery that have resulted in delays and the defendants' abilities to access it. Again, no fault to the government. The government did not intend those technical delays. They are what they are. There also has been significant documents produced since the last status conference which bears on the timing all of which necessitates the move to February in our view.

THE COURT: Thank you.

Anyone else?

MR. BLOCH: We join in that request, your Honor. Also having to do with the experts and the timing and ability to form the opinion and provide disclosure, but the real problem is the quantity of discovery and not just reading it. We may have people reading it, but you have to do more than just go through it. It is not a document production. There has to be some analysis that goes with it. In a complex case like this two and a half months while it seems like a lot, your Honor, the summer is almost over as far as we're concerned. So that is the reason for the adjournment request.

THE COURT: Counsel for the government?

MS. KRAMER: Your Honor, as we said in our July 25th, 2018 letter, there is still plenty of time. This is not in the government's view a reason for an adjournment and certainly not of the length that has been requested. We hear you that you

don't have any middle ground that you can settle on if your Part I commitment is immoveable. It just shouldn't be adjourned four months. There is just not a basis for it.

THE COURT: I am going to keep the October 15th trial date. I think two and a half months is enough time. I think it is a significant amount of time.

As I said I reserve decision on the pending motions. I will let you know about those as soon as I can.

Anything else y'all need address at this time?

MR. STERN: Your Honor, I would ask you to reconsider in light of there are additional facts I didn't want to belabor the response to the government's letter, but the work-paper issue that we have teed up and the government summarily dismisses is a real, real burden for our ability to be ready by October. As the government has indicated, we have only received excerpts of the work papers, not the entirety of the work papers. In reviewing those very voluminous excerpts is not just reviewing normal documents in the way you or I would think about this. There are dangling loose threads which often have busted cross-references if you will to changes or editions.

THE COURT: What do you mean "busted cross-references"?

MR. STERN: I apologize for the euphemism, but there are references in the work papers of the excerpts that we have

to additional work papers that changes that were made that are not included in the excerpts. Our ability to evaluate whether those changes were significant or material or permissible under the accounting rules may depend on the entirety of the work papers. And so when our lawyers, clients and experts have been diligently reviewing tens of thousands of pages of work papers, trying to find needles in a haystack in terms of the kinds of changes that the government has referenced with respect to the changes, often what we find is a rabbit trail to an end for which we don't have the additional papers. As Ms. Kramer alluded earlier this morning, we have gotten to the point where we have requested that KPMG try to walk us through this.

THE COURT: Tell me about that. I understand there was a reference to something that KPMG is going to be providing or presenting. What can you tell me about that?

MR. STERN: It is not clear to me exactly what it is. Your Honor what it is designed to do is hopefully designed to obviate the need for the defendants to go to KPMG and say, We need the entirety of these work papers. The only way we can evaluate the work papers and the only way our experts will be adequately prepared to testify at trial is to have the entirety of the work papers so that we can see every change that was made and the references.

As I have said work papers we as lawyers don't really understand. Maybe you have reference and experience than some

of the lawyers do in terms of the way work papers are compiled, but it is not the way we think of them the way we see them when they are finally prepared in a nicely orderly file. The matter in the way we have provided them have been as I say random to say the least. So our experts, clients, and lawyers have had to try to literally map out the thread of the changes by piecing together sometimes proposed changes to the work papers from emails that reference a work paper whose date has subsequently changed because the emails says, Can you make this change to this work paper on this date, and the work paper is not dated that.

So the process has been incredibly, incredibly burdensome and has taken much, much longer than we thought it would and much longer than even the government anticipates, which is why in their letter they say that process is sort of beside the point. The question of whether the changes were material or violated the accounting rules as Ms. Kramer said today is irrelevant to the question of whether the defendants intended to commit mail or wire fraud. We submit as you would expect that it bears directly on our client's intent. It bears directly on the question of whether they were coconspirators to commit mail and wire fraud if they were careful not to violate the accounting rules. As you can imagine it will be a central part of our defense that the changes were intended not to violate the accounting rules. So the process of going through

these tens of thousands of work papers.

Ultimately we may come back to you at some point and ask you to sign a subpoena for the balance of these work papers because we will have no other alternative but to do that at which point in time your Honor is going to be annoyed at us because you are going to say, I have an October trial date and you are now coming to me and asking for a subpoena for another tens or hundreds of thousands of pages of work papers.

THE COURT: If you are seeking the fuller picture, you have gotten what the government has in terms of work papers and you feel you need to complete the picture.

Where are you in that process? What have you gotten?

MR. STERN: So we have gotten the excerpts that the government has. As the letter from Cahill, Gordon previously indicates, the process of finding experts who are sufficiently equipped and available to review those and work with us has taken much, much longer than anticipated. We began the process in earnest in late February and we finally retained qualified, competent experts last month. Because this is not your garden-variety, run-of-the-mill case where any accounting expert will suffice, as you can imagine, and so the process of finding experts has taken much longer as anticipated. As a consequence of that, those experts are, along with our clients and our lawyers, pretty well into the process of reviewing the excerpts we have but a long way from making their way through

the work papers in a way that would enable them to come to court as a testifying expert and testify that the changes were consistent with the accounting standards or professional standards, and that ultimately is where the defendants need to be for purposes of their intent with respect to the crimes that they are charged with.

I understand why from the government's perspective all of that is irrelevant; but from the defendants' perspective, it bears directly on the defendants' state of mind and it is directly relevant. That is why when we say to you we really need additional time, we really need additional time.

THE COURT: How did y'all come up with a February date? Was that based on conferring with attorney on available times plus and additional time you need, or something else?

MR. STERN: It was a very calculated date that was selected. It was based on the time that we believe at least on behalf of Mr. Britt we needed. It took into account the fact that we were going to need this process to go through with the work papers. It took into account the fact that we were going to have difficulty interviewing, meeting and coordinating with potential witnesses over the Thanksgiving and the Christmas and New Years holidays. It took into account a myriad of circumstances. It was not a date that was arbitrarily chosen.

Your Honor, I would point out that it is a date that is less than what we initially -- when we first requested a

trial date and an adjournment back in March, we suggested April, which was our best estimate at that point in time. Now, while we recognize we need more time, we recognize that we can put on an efficient and effective case in support of our clients in February of next year.

THE COURT: Did you want to add anything?

MR. COOK: If I could, your Honor, I would to correct what might be a misimpression.

Mr. Wada is the only defendant that was not a KPMG employee. He was an inspection leader at the PCAOB. Because of that, and I don't know this, but he does not benefit from whatever third-party pair arrangements the other defendants may enjoy. He is on a very limited budget and we don't have as your Honor mentioned teams of attorneys and legal systems and paralegals we can throw at all this discovery.

THE COURT: Does PCAOB pay for his defense?

MR. COOK: No. So we have to use our resources very wisely and carefully. The additional time that we requested would will be well used and be essential for us to adequately review the voluminous discovery in this case and to prepare for trial.

THE COURT: Well, Mr. Stern makes a pretty persuasive case that this is not something that is a matter of convenience but it is something that the defendants need to prepare their defense. Although, to some extent I believe that the work of

preparing for a trial expands to fill whatever time you have, I don't want to prejudice any of the defendants' cases.

I will give you a chance to respond, Ms. Kramer, if you want to take one more shot at it.

But I want to confirm that each of the defendants would certainly be able to try the case on February 11th, 2019, if I did move it and that there would be no objection to the excluding the time under the Speedy Trial Act to that date.

Could I confirm that as each of them?

MR. BOXER: Confirmed, your Honor.

MS. HELLER: Confirmed.

MR. STERN: Confirmed, your Honor.

MR. BLOCH: Confirmed.

MR. COOK: Confirmed as to Mr. Wada.

THE COURT: Do you want to give it one more shot?

MS. KRAMER: Well, your Honor, as Mr. Stern acknowledges and as we put in our letter opposing the adjournment, there is a real question of how relevant the work papers are going to be at trial and in particular I would say these -- I can't remember the term Mr. Stern used -- broken threads where you can't figure out the end, that is obviously something that doesn't allow for them to have the complete picture of the entirety of the work papers for a given inspection; but the government's understanding of how these work papers were gathered and produced was at least in part to

reveal changes that were made and that are identifiable. So the quasi fishing expedition that exists, what may be out there in additional work papers that the government doesn't intend to use and that are sort of broken chains in the link of database of hundreds or thousands of work papers, that doesn't get to the core of the issue even if the extent of the changes both in terms of quality and quantity is an important issue at trial. It seems like this could potentially go on forever.

There are tons of work papers for each engagement. There are a lot of audits that were conducted in this case. It does not go beyond what we have alleged in the indictment as examples of changes. That is not the core of the case. To adjourn the trial for four months is for that reason, to pursue something that may or may not lead to anything that is even relevant or admissible -- I am sure this can be something that can be the subject of a motion in limine -- it is just not warranted.

THE COURT: I am going to grant the request for adjournment of the trial date to February 11th, 2019. It is hard to analyze these issues when I haven't gotten my hands dirty with all the evidence as you have in terms of the detail required. I know that it is a complex case. I had set an October date, which is a fairly early trial date given that the case began in the beginning of 2018. I don't believe that the defendants are requesting an adjournment in bad faith or for

reasons that are not good reasons. So I am going to grant the request to adjourn the trial date to February 11th, 2019. I believe that you should all assume 100 percent that the trial will happen on that date and will not be moved again.

As I said, I am reserving on the other matters.

I am going to exclude time under the Speedy Trial Act. I note that each of the defendants consents to the exclusion of time. I find that the ends of justice outweigh the interest of the public and each of the defendants in a speedy trial for the reasons essentially we have been discussing, which is the complexity of the issues in the case, the need for additional time, for the parties to prepare for trial, and possible discussion of disposition of the matter.

Is There anything else anyone wants to discuss today?

MR. BOXER: I did, your Honor.

THE COURT: Yes.

MR. BOXER: Your Honor, the defense would like to schedule some deadlines for various materials in some of the litigation that was referred to today -- in limine motions, experts. We're familiar with the order your Honor entered in *U.S. v. Block* and the way it staggered disclosures regarding experts, expert deadlines with exhibit lists, 3500 material. We have some thoughts as to what those deadlines should be, but more importantly we would like to raise the issue and take guidance from you as how to proceed in setting some of those

deadlines. Since we're all here and we have a trial date, it would be useful to know when to expect what we'll be receiving. So I am happy to suggest some times; but if you think there is a better process, I will be happy to follow that.

THE COURT: Well, the process I used before was to have the parties confer, and that is what I did in *Block*, and they were able to reach agreement. If you are not able to reach agreement, I will hear each side's proposal and come up with something myself.

So have you conferred?

MR. BOXER: We have not.

THE COURT: I think you should confer first and see if you can reach agreement. Obviously you have more time. If you're not able to reach agreement, you can submit each parties' proposal and I will determine what I think is appropriate.

MR. BOXER: Thank you very much. We'll do that.

THE COURT: Anything else from anybody?

MS. KRAMER: Not from the government, your Honor.

MS. HAAG: No, your Honor.

THE COURT: Thank you very much.

o0o